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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 751

SIDNEY J. UNGAR, *Petitioner*,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Petitioner prays that a writ of certiorari issue to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered on April 21, 1966, disbarring petitioner from practice as an attorney and counselor-at-law.

OPINION BELOW

The opinion of the court below is reported at 25 App. Div. 2d 322, 269 N.Y.S. 2d 163.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The order of the Appellate Division was entered on April 21, 1966. On July 7, 1966, the Court of Appeals of the State of New York entered orders denying petitioner leave to appeal and dismissing the appeal taken as of right from the order of the Appellate Division of April 21, 1966.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination forbids disbarment of an attorney on the basis of charges with respect to which his testimony was compelled under a grant of immunity.

2. Whether disbarment may be imposed upon an attorney as an additional punishment for a conviction for criminal contempt and, if so, whether such disbarment violates due process where the criminal contempt hearing was before the judge who preferred the charges and who presided at the trial at which the alleged contempt occurred and where the attorney was required to defend against the charges without an opportunity to obtain other counsel when retained counsel was permitted to withdraw because of the denial of an adjournment.

3. Whether there is a denial of due process when criminal charges not related to the practice of law are made the basis of disbarment without the safeguards of a criminal trial.

4. Whether there is a denial of due process when a charge of conspiracy to obstruct justice is sustained without a finding of conspiracy but only a finding of a purpose to obstruct justice by a false statement to an assistant district attorney.

5. Whether in this case the punishment of disbarment is so unreasonable in relation to the conduct charged and so unrelated to the legitimate interests of the State in regulating the practice of law as to constitute a deprivation of due process.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V.

No person * * * shall be compelled in any criminal case to be a witness against himself * * * .

United States Constitution, Amendment XIV

Section 1 * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

Section 750, Judiciary Law of New York (McKinney's "Consolidated Laws of New York Annotated"): Power of courts to punish for criminal contempts:

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. * * *

Insofar as here pertinent, Sections 886 and 901 of the New York City Charter provided:

886: (1) No officer * * * whose salary is payable in whole or in part from the city treasury shall * * * accept any gift, loan or thing or promise of value from any person, firm or corporation interested directly or indirectly in any manner whatsoever, in or in the performance of * * * any contract, work or business or the sale or acquisition of any property, the expense, price or consideration of which is payable from the city treasury * * *.

901: Any officer or employee of the city who shall knowingly * * * accept or receive any gratuity from any person whose interests may be affected by his official action shall be guilty of a misdemeanor and if convicted shall forfeit his office or employment.

STATEMENT OF CASE

1. INTRODUCTION

Petitioner was admitted to practice as an attorney and counselor at law in the State of New York on November 4, 1935. On April 21, 1966, in disciplinary proceedings brought by the Association of the Bar of the City of New York, the Appellate Division of the Supreme Court of the State of New York, First Department, entered an order of disbarment which the New York Court of Appeals declined to review on July 7, 1966. One of the grounds for disbarment was petitioner's criminal contempt conviction which was affirmed by this Court in *Ungar* v. *Sarafite,* 376 U.S. 575.

The charges filed by the Bar Association in the disciplinary proceedings have their background in advances of approximately $4,000 made by petitioner in February, March and April of 1958 to pay for remodeling the apartment of Hulan E. Jack, then President of the Borough of Manhattan. In December 1959, after an investigation, the District Attorney's office presented the matter to the Grand Jury. Jack was indicted on charges relating to these advances and, after a jury disagreement in the first trial, was convicted in a second trial. On charges based on statements made while testifying in the second Jack trial, petitioner was thereafter convicted for criminal contempt.

The charges in the disciplinary proceeding involve the advances made in 1958, the investigation by the prosecuting attorney of these advances and related circumstances, the grand jury investigation, petitioner's testimony in the Jack trials, and the hearing and other proceedings relating to his conviction for criminal contempt. The specific charges

were: (1) as a result of conduct in the second Jack trial, petitioner "was found guilty of criminal contempt of court;" (2) during the course of the trial, he "shouted at the court * * * in the immediate hearing and presence of the jury, 'I am being coerced and intimidated, the court is suppressing the evidence' "; (3) he "aided and abetted Hulan E. Jack in violating Sections 886 and 901 of the New York City Charter" by making certain payments for Jack's benefit; and (4) he conspired with Jack "to obstruct justice and the administration of the New York City Charter * * * in violation of Penal Law, Section 580" by concealing these payments.

An appropriate account of the extensive background of the charges and of the proceedings, evidence, and findings in the disciplinary hearing for presentation of the constitutional issues submitted by this petition necessitates a lengthier recital of facts than is ordinarily warranted.

2. EVENTS PRIOR TO JACK TRIALS

The Referee in the disciplinary hearings found that petitioner and Jack, as well as their wives, had been close personal friends for many years prior to 1958;[1] that they visited in each other's homes, went on vacations together, belonged to the same political club for years, attended political conventions together, and even shared the same suite (R. 50).[2] Petitioner played an active role in Jack's being named Democratic leader of his district and in his

---

[1] According to the testimony, this was about 20 years (Tr. 1610). "Tr." references are to the pages of the transcript of testimony before the Referee in disciplinary proceeding.

[2] The Referee's report is reprinted as an Appendix to the "Memorandum on Behalf of the Association of the Bar of the City of New York" filed in the Appellate Division in support of the report. "R." references are to the pages of the Referee's report in this appendix which has been included in the record of proceedings transmitted to this Court.

election in 1953 as President of the Borough of Manhattan (R. 50).

On a number of occasions, after Jack's election as Borough President in 1953, petitioner and his wife, as well as Mrs. Jack, urged Jack to have his apartment refurnished and redecorated (R. 50). After his re-election in November 1957, the subject was discussed again. For a number of years petitioner had been actively engaged in the real estate business in which he had employed a contractor, Bechtel, and it was thought that if petitioner "negotiated the job with Bechtel, and made the payments therefor to Bechtel, the work could be done at a minimum cost" (R. 51). Accordingly, petitioner arranged for Bechtel to do the redecorating work for approximately $4,000 which, with new furnishings, brought the total cost to about $15,000 (R. 53-54). Jack's resources were limited to approximately $12,000 and petitioner offered to pay Bechtel and to accept repayment when Jack was able (R. 51, 54). Bechtel thereafter did the work and was paid by petitioner during the months of February, March and April 1958 (R. 38).

In 1959 petitioner became involved in a controversy with the *New York Post* and brought a libel action for publication of the charge that he was a "slumlord". Thereafter, on December 7, 1959, Bechtel told a *Post* reporter that petitioner had paid for the work on Jack's apartment. At a meeting on December 9th, attended by petitioner, Jack, and others, to avoid publicity that Jack thought would be embarrassing to him, petitioner agreed, at Jack's request, to state that Bechtel had been paid by Jack if there was newspaper publicity. The Referee found that publicity was the only subject discussed at the meeting which resulted in this agreement and that no one thought of any criminal investigation. (R. 67-72.)

On December 11, 1959, petitioner telephoned Assistant District Attorney Scotti to file a complaint against the *New York Post* in connection with an attempt to place an

illegal listening device in Bechtel's apartment. Scotti was unavailable but telephoned petitioner's partner later that afternoon and stated he would like to talk to petitioner who then went to Scotti's office. While petitioner was at the District Attorney's office, the *Post* reporter who had spoken to Bechtel telephoned Scotti twice. During their conference, Scotti advised petitioner of a complaint by the *Post* that petitioner had charged personal expenses to one of his wholly owned corporations. Petitioner pressed his complaint against the *Post* which Scotti appeared unwilling to entertain, a heated argument ensued, and when petitioner started to leave, Scotti called him back for the stated purpose of considering petitioner's complaint against the *Post*. Scotti then asked petitioner to answer a few questions so that he could "get the whole picture" and petitioner's discussion of the contract with Bechtel was the first reference to Jack. Thereafter, in response to a question by Scotti, petitioner denied that he had paid for the work because, as he testified, he did not want this information relayed to the *Post* reporter who had been telephoning Scotti. Petitioner testified that when he learned of the grand jury investigation, he decided to abandon the publicity cover-up and on Monday morning, December 14, 1959, before the convening of the Grand Jury, advised an assistant district attorney of the facts (R. 79-82).

On Tuesday, December 15, petitioner appeared before the Grand Jury, asserted his constitutional privilege against self-incrimination, was directed to testify, was granted immunity from prosecution for any criminal offenses disclosed in his testimony, and testified for ten days. Thereafter, Jack was indicted and tried on three counts of violating conflict-of-interest provisions in the New York City Charter and one count of conspiracy to obstruct justice. Petitioner was named as co-conspirator but not a defendant.

3. JACK TRIALS

The first trial, in which petitioner testified for six full days, ended in a jury disagreement. In the second trial, Jack was convicted of two charges based on Section 886 (now 1106) of the City Charter prohibiting the acceptance by an employee of anything of value from any person interested in any business with the City and of the charge of conspiracy to obstruct justice. He was acquitted of the charge based on Section 901 (now 1121) of the City Charter involving the receipt of "any gratuity from any person whose interests may be affected by his official action".

Petitioner's testimony in the second trial was circumscribed to three days (C. 80-442).[3] Although not a defendant, petitioner's professional integrity and business reputation were involved since he had been named as a co-conspirator, and he was interested in presenting a complete picture of all the pertinent facts.[4] Although called by the

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[3] Petitioner's testimony in the two Jack trials was introduced by the Court as exhibits in the contempt proceeding (C. 54). The Record on Appeal in the contempt proceeding, which included this testimony, was introduced as an exhibit in the disciplinary proceeding. "C." references are to the pages of this Record on Appeal which has been included in the record of the present proceeding transmitted to this Court.

[4] Events proved that in reality petitioner was on trial in a very practical sense. Although immunity had been granted to obtain petitioner's testimony, eventual disbarment of petitioner through the conviction of Jack was clearly in the mind of the prosecuting attorney in the Jack trials. Thus, in concluding petitioner's direct examination, he put the following question (C. 321):

> Q. Now you appreciate, do you not, Mr. Ungar, that while you received immunity from prosecution for whatever crimes you might have disclosed in the course of your testimony, you do not receive immunity from any disbarment proceeding that may be instituted against you.

The conviction of Jack was the basis of charge III in the disciplinary proceeding that petitioner aided and abetted Jack in violating sections of the New York City Charter.

prosecution, he was treated by the prosecutor as a hostile witness from the very inception of his testimony.[5] Petitioner found single-word answers to the prosecuting attorney's carefully tailored questions incompatible with an accurate portrayal of the situation and his attempts to respond with fuller explanations met with strong admonitions by the court (C. 187-191, 203-207, 279-281). On his third day of testimony, petitioner testified that on the morning of December 12, 1959, after his interview with Scotti the previous afternoon, he told Jack of the grand jury investigation. When questioned by the prosecuting attorney concerning Jack's reply, petitioner answered that this was only a small part of what he had told Jack.[6] The prosecutor's motion to strike this answer was granted and he repeated the question. Petitioner replied (C. 302-303):

> A. He didn't respond to just one simple statement. It was part of a conversation, and I can't distinguish one sentence from another in a half-hour conversation the full details of which I don't recollect.

---

[5] Before he appeared as a witness in the second trial, petitioner had delivered to the Court papers designated "Notice of Motion, Affidavit and Exhibits" which requested, among other things, that he "be considered as if he had been called by the Court" and "be given the protection of the Court" against objectionable questions "by either the District Attorney or Defendant's counsel" (C. 79). The Court stated, "I am not treating it as a motion" but as "addressed to the Court in camera", denied the request as without merit, and emphasized "that these papers shall not be deemed a public record" (C. 79-79a). When defendant's counsel, upon whom a copy had been served, advised the Court that a newspaperman had borrowed his copy, the Court advised him to "communicate with that newspaperman immediately and ask for the return of the paper" (C. 79a).

[6] In the first trial, petitioner gave the full conversation which the prosecuting attorney apparently did not want disclosed to the jury in the second trial.

On its own motion, the Court ordered this answer stricken and began to admonish the witness (C. 303).[7]

Petitioner requested a recess stating he was too nervous and upset to testify and that he was unable to testify because he was being pressured and coerced and intimidated into testifying (C. 303-304). Petitioner requested the right to have counsel, stating that he was being badgered by the Court and by the District Attorney (C. 304). After further discussion, the following colloquy occurred (C. 305-306):

> The Witness: I can't testify, your Honor. I am shaking all over. And I must have a recess, I just am absolutely a bundle of nerves at this point, and I don't know what I'm doing or saying any more.
>
> I ask for the privilege of leaving the stand, your Honor.
>
> The Court: No, you will remain on the stand.
>
> The Witness: I can't testify, I'm sorry, your Honor. I am not in any physical or mental condition to testify.
>
> The Court: Mr. Witness, no one asked you anything. Nobody is questioning you. You are not testifying. We have taken a recess for about three minutes of silence, and we will take a few more minutes.
>
> The Witness: I would like to leave the stand, your Honor.
>
> The Court: No, you may not leave the stand.
>
> (Whereupon, there was a further brief interval of silence in the courtroom.)

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[7] The judge, who had also presided at the first trial, had formerly been a member of the District Attorney's office and had been the prosecuting attorney's immediate superior for approximately 15 years.

After the Court directed the prosecuting attorney to proceed, the following occurred [C. 306]:

> The Witness: I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence.
>
> The Court: You are not only contemptuous but disorderly and insolent.
>
> The Witness: I have asked for the privilege of leaving the stand for five minutes.
>
> The Court: Put your question, Mr. Scotti.

The prosecuting attorney put a further question to petitioner who stated that he was unable to answer any questions, that he could not think clearly, and that he was an emotional wreck; he renewed his request for a recess "so that I can contain myself" (C. 307). When the question was put to him again by the prosecuting attorney, he remained silent (C. 307). The court then advanced the luncheon recess (C. 307).

After the jury retired, Jack's attorney requested the court to appoint a doctor to examine petitioner in view of his statement that he was emotionally or mentally incapable of testifying. Petitioner joined in the request for a medical examination. The court stated (C. 308):

> In my judgment, this is as near as malingering could ever be determined, from my observation.

The Court took two short recesses, then reserved decision on the request for appointment of a doctor until after the luncheon recess (C. 309-310).

After the luncheon recess, petitioner reported to the court that he had gone to a hospital, received an injection, "and I think that I can proceed temporarily, in addition to the pills I have taken this morning." (C. 311.) The direct examination of petitioner proceeded thereafter without further incident. In response to a subsequent question by the court, petitioner stated (C. 326):

> I said I thought I could go on because I had an injection. I took a number of pills this morning and last night.

At the conclusion of petitioner's testimony, the Court stated (C. 442):

> Now, Mr. Witness, with regard to your conduct as a witness in this case, the Court is deferring action until the completion of this trial. Please hold yourself available at that time.

Subsequently, Jack's counsel noted there had been no ruling on his motion of November 25th for a medical examination of petitioner with respect to his outburst on the morning of that day, and observed that petitioner, after stating that he had received an injection and taken some pills, answered questions in an uninteresting, docile-like manner. Apparently accepting his explanation that he had been under medication, the Court referred to petitioner's statement that during the luncheon recess he had received an injection and "thought that everyone then understood that the witness himself had concluded the issue by declaring that he was then able to proceed". The motion for a medical examination was denied. (C. 443-444.)

4. THE CONTEMPT PROCEEDING

Two days after the conclusion of the Jack trial, on Thursday, December 8, 1960, at about 5 p.m., the trial judge caused to be served on petitioner an order to show cause citing him for contempt returnable on Tuesday, December 13, 1960, at 10 a.m. The charge contained 13 recitals of

events other than the outburst of November 25th and consisted of 31 pages of the printed record (C. 11-43). The short period allowed to respond to the charges included the intervening Saturday and Sunday during which a 17-inch snowstorm fell, paralyzing the City and traffic on Sunday and Monday. Petitioner retained counsel on Saturday by telephone, but did not consult with him because of the weather and his engagement in another trial. On the return day, counsel's request for an adjournment of one week on the grounds that he needed time to prepare a defense and was then engaged in a trial was denied.[8] Upon the denial of an adjournment, counsel withdrew, leaving petitioner without representation. (C. 45-53.) The judge, who preferred the charge of contempt and who presided at the trial on the charge, then proceeded with the contempt hearing and personally introduced all the evidence against petitioner. His directions to the Clerk with respect to the evidence were as follows (C. 53-55):

> **The Court: Now let's proceed.**
>
> In this proceeding, in the Matter of the Criminal Contempt of Sidney J. Ungar, I direct the Clerk to mark in evidence as one exhibit the following papers referred to on Page 3 of the order to show cause, to wit, a letter dated November 15, 1960, from the respondent, addressed to the Court, with two enclosures

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[8] Rule VII of the Rules of the Court of General Sessions of the County of New York states:

> No adjournment of the trial shall be granted by reason of engagement of counsel * * * unless it be made to appear by affidavit that counsel * * * is actually engaged in the trial of a case * * * *in which event the trial of the action shall be passed* for the day or until such argument or trial is concluded * * *.

See also, *Matter of Rotwein*, 291 N.Y. 116; *People* v. *McLaughlin*, 291 N.Y. 483; *People* v. *Koch*, 299 N.Y. 378, 381; *People* v. *Gordon*, 262 A.D. 534, 536.

being copies of two other letters, one dated September 29, 1960, and the other October 4, 1960, together with the envelope in which these documents came.

Please mark that.

The Clerk of the Court: Court's Exhibit No. 1, your Honor.

* * *

The Court: I direct the Clerk to mark, as Court's Exhibit No. 2, the minutes of the testimony of the respondent in the first trial of the indictment in the case of the People of the State of New York v. Hulan E. Jack, which was tried from June 9, 1960 to July 6, 1960.

That will be deemed marked Court's Exhibit 2 in Evidence.

* * *

The Court: Next I direct the Clerk of the Court to deem marked the minutes of the testimony of the respondent in the second trial of the People of the State of New York against Hulan E. Jack, which was conducted from November 15, 1960 to December 6, 1960.

* * *

The Court: Now that completes the proceedings so far as the Court is concerned.

The Court then called upon petitioner to answer the charges. Petitioner objected to going forward at that time, stating (C. 58-61) that he had "had no opportunity at all to prepare, to answer a thiry-page specification, which was served upon me Thursday afternoon at 5:00 p.m.", that he was "entitled to a reasonable opportunity to obtain counsel and secure and prepare a defense" and that he would "be prepared to answer the Court's charges at a proper hearing, if the Court will give me such an opportunity, because I am satisfied in my mind and in my conscience that I can establish, with adequate opportunity, that I did not

commit any contempt of court." His request for an adjournment was denied and the hearing was concluded without petitioner's being able to present any evidence in his defense.

In a statement before announcing its decision, the Court acknowledged "without going into the merits of any claim of illness being responsible for the conduct," that petitioner "while on the stand, was laboring under a nervous strain" (C. 63-64). The Court then found petitioner guilty of contempt for his statement to the Court on November 25, 1960, imposed a fine of $250, imprisonment for ten days, and commanded the Sheriff "to receive the said Sidney J. Ungar into custody and to detain him in the civil jail in the County of New York until the judgment of this Court is satisfied" (C. 64, 66-67). Petitioner's request for a stay of execution to permit an application to the Appellate Division for either bail or parole was denied (C. 66).

Because the contempt finding was based only on the November 25 incident, petitioner requested an opportunity (C. 67) "to submit medical proof this afternoon at two o'clock from a doctor and a hospital to show that those remarks were made under emotional strain and stress and were incurred because of the Court's repeated refusal to grant me a recess and an opportunity to leave the stand * * * there were at least three or four times before this remark was made in which I begged the Court repeatedly to please give me a recess because I was too upset and nervous to continue * * *."[9] This application was denied.

---

[9] The Appellate Division apparently overlooked this statement, as well as his statement in the second Jack trial as to his emotional upset and having taken a number of pills the morning and evening immediately preceding the utterance in question, when it commented in its opinion confirming the Referee's report that petitioner's claim that medication contributed to an overwrought emotional condition "was first advanced by respondent four years after the event".

The contempt conviction was affirmed by the Appellate Division on Tuesday, April 3, twelve days after submission of the appeal to it on March 22. The New York Court of Appeals affirmed but wrote the following memorandum:

> However, we point out that where the alleged contempt consists of the making of charges of wrongdoing by the trial judge himself, he should, where disposition of the contempt charge can be withheld until after trial, and where it is otherwise practicable, order the contempt proceeding to be held before a different judge.

This Court affirmed, by a divided Court, holding that there was no deprivation of due process either in the contempt charge being tried by the judge who made the charges or in his refusal to grant an adjournment to permit petitioner to retain counsel and prepare a defense. *Ungar* v. *Sarafite*, 376 U.S. 575.

5. DISCIPLINARY PROCEEDINGS

The Bar Association petition which initiated the disciplinary proceedings was submitted on September 25, 1962, after affirmance of the contempt conviction by the Appellate Division but before the decisions of the Court of Appeals or this Court. Petitioner's answer to the charges dated November 29, 1962, admitted his conviction for criminal contempt and his making the statement upon which the conviction was based, but denied that he had been guilty of any professional misconduct or that his conduct justified the conviction. He denied the other charges. Among several affirmative defenses, petitioner claimed that the charges of aiding and abetting Jack in the City Charter violations and of conspiring to obstruct justice violated his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law because his testimony with respect to these matters before the Grand Jury had been

obtained under a grant of immunity. The Appellate Division struck petitioner's affirmative defenses as insufficient in law and denied petitioner's motion for leave to appeal from this order to the Court of Appeals. On December 18, 1962, the Appellate Division appointed a Referee to take testimony with respect to the charges and to report. Hearings were continued to May 19, 1964, pending the decision of the Court of Appeals and this Court on the criminal contempt appeal. The Referee filed his report on April 2, 1965.

The Referee found charge I relating to the conviction of criminal contempt "established as a matter of law." With respect to charge II, relating to the November 25 statement which was the basis of the contempt conviction, petitioner presented evidence that he was so mentally and physically upset at the time that his remarks were involuntary and unintentional. He testified that on November 24 he had been given a prescription by his physician. The physician had died about two years before the hearing (Tr. 1962) and the pharmacist who filled the prescription testified from his records that he delivered the prescription for pills to petitioner on November 24, 1960 (Tr. 1837). The manufacturer's literature which the witness produced stated that patients "occasionally become agitated during the therapy and that hypermanic and manic episodes may occur occasionally during the therapy" (Tr. 1843). Petitioner testified that he had taken three pills during the morning of November 25th and, at the point of the trial involved in the contempt conviction, that his heart had began to pound and he was shaking from head to foot (Tr. 1966-1968). He further testified that Francis X. Clark, an assistant district attorney who was present at the trial, had just recently told him that he remembered that petitioner was "upset, nervous and excited" and that he was "still shaking" at the lunch recess. When called by petitioner as a witness, however, Clark testified that although petitioner was "apparently upset" he believed his conduct a deliberate act

(Tr. 1669).[10] The Referee's conclusion with respect to charge II was as follows (R. 110-111):

> Respondent admits having uttered the language attributed to him in the charge, as amended, and that he shouted it at the Court, while the Court was in session, and in the immediate hearing and presence of the jury. *The charge is, accordingly, admitted, and in my opinion respondent has not presented any justification or adequate excuse, mitigation or extenuation.* [Emphasis supplied.]

Charge III, which related to aiding and abetting Jack in violating New York's Charter provisions, involved two matters of business claimed to be pending before the city at the time of petitioner's advances for Jack. Petitioner denied any interest in business with the city at the time he made the payments and asserted that he did not intend to and did not in fact influence Jack's official action. The alleged business with the city was (1) a lease of space by the City in a building located at 299 Broadway owned by a corporation in which petitioner had a 10% interest, and (2) the Riverside-Amsterdam project, a proposed Title I project under the United States Housing Act, which a corporation in which petitioner had a 19% ownership was interested in sponsoring. The Referee found that the 299 Broadway lease had been approved by the City before petitioner "even discussed with Jack the matter of financing the improvements in Jack's apartment" and that the charge had not been sustained as to this transaction,[11] but that it had been sustained as to the Riverside-Amsterdam Project on the basis of the following facts.

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[10] Clark testified that he had spent about six days in preparing the contempt specifications under Judge Sarafite's direction (Tr. 1670).

[11] Jack had been convicted of a Charter violation with respect to this transaction.

Petitioner submitted to the Director of the Slum Clearance Committee of the City of New York, of which Robert Moses was Chairman, a plan which received the preliminary approval of Jack as Borough President in 1956. On October 9, 1956, the Slum Clearance Committee accepted petitioner's proposal as the highest bidder, subject to approval by the United States. In the summer of 1957, the project was suspended because of general policy questions relating to the entire Title I program and petitioner was advised in the fall of 1957 that the sponsorship of the project was to be reviewed when these policy questions were resolved. In July 1958, petitioner's sponsorship was reconfirmed by the Slum Clearance Committee. In February 1959, the project was to appear on the Board of Estimate's calendar for preliminary approval without any designated sponsorship, but as a result of the *Post's* characterization of petitioner as a "slumlord", the matter was adjourned. After further adjournments, it was laid over indefinitely in April 1959 and in December 1959 the Board of Estimate referred the matter back to the Planning Commission. Jack supported these adverse actions (Tr. 1863-1864). The project has never been acted on. (R. 42-46.)

The Referee's report described discussions of petitioner with Jack in 1956 and after July 1958. It does not state, however, nor was there any testimony that in the intervening period Jack and petitioner had any conversations or contacts with respect to the matter or that anything was pending before the Board of Estimate or before Jack. Although the project had been suspended in the summer of 1957 and apparently remained dormant until July of 1958, during which time the arrangements for and the actual advances were made, the Referee found charge III sustained because in the period from 1956 to 1959 petitioner "was a person doing business with the City of New York, and interested in City contracts, within the meaning of

Sections 886 and 901" (R. 46-47, 49-50).[12] The Referee made no finding that petitioner influenced or attempted to influence Jack, holding that violation of the Charter provisions did not depend on any intent to influence, the actual influence of official action, or any evil motive (R. 38-39).[13]

The charge of conspiracy to obstruct justice and the administration of the New York City Charter (charge IV) was held established without a finding of conspiracy, on the ground that petitioner "for the purpose of obstructing" the administration of justice had made a misstatement to Assistant District Attorney Scotti.[14] This misstatement referred to the denial on Friday afternoon, December 11, 1959, of petitioner's payment on behalf of Jack which he corrected on the following Monday before the grand jury had been convened. This misstatement followed the meeting of Wednesday, December 9th, at which the story that Mrs. Jack had paid Bechtel was agreed upon solely for publicity purposes. The Referee found (R. 72):

> There was no mention of, or reference to, the District Attorney, or to the possibility that any crime was involved, or to any grand jury investigation, and there is nothing to indicate that up to this time, at least, anyone thought that the transaction between respondent

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[12] Although the charge sustained was that petitioner aided and abetted Jack in violating Secs. 886 and 901 of the New York City Charter, Jack had been acquitted of the charge of violating Section 901.

[13] In the trial of Jack, the prosecuting attorney stated: "This case does not involve an exercise of influence" (C. 346).

[14] The Referee's report stated (R. 95):

> In my opinion, respondent, for the purpose of obstructing and defeating the administration of justice, willfully and knowingly gave Assistant District Attorney Scotti false information concerning important and material facts involved in a grand jury investigation. Consequently, in my opinion, this charge has been established.

and Jack might result in any criminal investigation, proceeding or prosecution.

There is no evidence, and no suggestion by the Referee, of any subsequent agreement to tell this story for any other purpose when petitioner, on Friday, December 11th, denied to Assistant District Attorney Scotti that he had made the payments for Jack.

In challenging the Referee's report before the Appellate Division, petitioner, among other things, claimed a violation of due process in the charge of aiding and abetting the violation of Section 886 and Section 901 of the City Charter and in the Referee's sustaining the charge of conspiracy to obstruct justice and the administration of the New York City Charter on the basis of an individual misstatement to an assistant district attorney without a finding of conspiracy. Without discussing the legal or constitutional issues, the Appellate Division confirmed the Referee's report and, without relating any specific charge or charges to its conclusion, concluded that petitioner's "conduct, activities and methods were clearly in violation of the ethical standards required of members of the Bar" and that he should be disbarred.

Petitioner's appeal as of right and motion for leave to appeal to the Court of Appeals, urged a denial of due process on the grounds (1) that the hearing in the criminal contempt conviction did not meet proper standards for the serious punishment of disbarment, (2) that the statutes upon which the disciplinary charges were based, namely, Sections 750 and 751 of the judiciary law, Sections 886 and 901 of the New York City Charter, and Section 580 (conspiracy) of the penal law, as construed and applied, were unconstitutionally vague, (3) that the drastic order of disbarment did not bear a reasonable relation to the State's legitimate objectives in regulating the practice of law, and (4) that the charge of conspiracy to obstruct justice and

the administration of the City Charter was sustained without any finding of conspiracy. Since obstruction of justice, in the absence of conspiracy, had not been defined as a crime, under New York Law, violation of the constitutional *ex post facto* prohibition was also claimed. The Court of Appeals denied petitioner's motion for leave to appeal and dismissed the appeal on the ground "that there are no substantial constitutional questions directly involved."

REASONS FOR GRANTING THE WRIT

The Appellate Division confirmed the Referee's findings sustaining all four charges and, stating that petitioner's "conduct and activities and methods were clearly in violation of the ethical standards required of members of the Bar," concluded that he should be disbarred. "Since the Appellate Division in its opinion did not explicitly discriminate among the grounds upon which its disbarment order was based" (Memorandum of Mr. Justice Harlan on granting stay, September 30, 1966), it is impossible to determine whether it regarded each charge as sufficient to justify disbarment or whether disbarment was decreed because of the combined weight of the four charges and, consequently, whether the elimination of any charge would have produced a different result. It must be assumed, therefore, that each charge was necessary to the result reached. Consequently, the violation of constitutional standards with respect to any charge requires reversal.

Petitioner claims (1) infringement of the Fifth Amendment privilege against self-incrimination by the filing of disciplinary charges based on matters with respect to which his testimony before the grand jury was compelled by a grant of immunity; (2) violation of procedural due process (a) in predicating the serious punishment of disbarment upon the criminal contempt conviction in which the hearing satisfied due process only for purposes of a minor punishment, (b) in basing disbarment upon a charge of

criminal conduct unrelated to the practice of law without the procedural safeguards of a criminal trial, and (c) in sustaining as proved a charge of conspiracy without a finding of conspiracy; and (3) violation of substantive due process in imposing the severe punishment of disbarment for the charges sustained.

1. DISCIPLINARY CHARGES BASED UPON MATTERS CONCERNING WHICH PETITIONER TESTIFIED BEFORE GRAND JURY UNDER GRANT OF IMMUNITY VIOLATE SELF-INCRIMINATION PRIVILEGE.

The disciplinary charges relating to aiding and abetting Jack's violation of the City Charter and to conspiracy to obstruct justice involve the same subject matter with respect to which petitioner testified under a grant of immunity before the grand jury and in the Jack trials. In reviewing his contempt conviction, this Court in *Ungar* v. *Sarafite*, 376 U.S. 575, 576, stated that petitioner "was an important prosecution witness * * * and immune from prosecution for his testimony on these matters before the grand jury."

Malloy v. *Hogan*, 378 U.S. 1, 8, held that "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement". Petitioner contends the penalty of disbarment is equivalent to a criminal punishment and, therefore, the Fifth Amendment's privilege against self-incrimination prevents the matters with respect to which he testified under a grant of immunity from being the basis for disbarment.

This Court's recognition of the severe consequences of disbarment justifies its treatment as criminal punishment for purposes of the self-incrimination privilege. The Court has held other civil forfeitures to be within the privilege (*Boyd* v. *United States*, 116 U.S. 616; *Lees* v. *United States*, 150 U.S. 476; cf. *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 701) and disbarment to be punish-

ment for purposes of the Constitution's bill of attainder and *ex post facto* prohibitions. *Ex Parte Garland,* 4 Wall. 333, 377 (legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings* v. *Missouri,* 4 Wall. 277, 327 ("This deprivation [of right to pursue regular avocations] is punishment"); cf. *United States* v. *Lovett,* 328 U.S. 303, 316 ("permanent proscription from any opportunity to serve the Government is punishment"); *United States* v. *Brown,* 381 U.S. 437 (disqualification from holding union office held punishment).

The punitive effects of disbarment were described in *Bradley* v. *Fisher,* 13 Wall. 335, 355:

> To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family.

In *Ex Parte Wall,* 107 U.S. 265, 318, the dissenting opinion of Mr. Justice Field asserted that "To disbar an attorney is to inflict upon him a punishment of the severest character." Disbarment was more recently characterized in Mr. Justice Black's dissent in *Cohen* v. *Hurley,* 366 U.S. 117 at 147, as so severe as to entitle a lawyer to "the full benefit of the 'law of the land' ". In dissenting opinions, Mr. Justice Douglas stated in the same case (pp. 153-154) that "Taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction, perhaps more so" and in *Ullmann* v. *United States,* 350 U.S. 422, 440-441, that "disabilities imposed by federal law [such as "ineligibility for employment in the Federal Government and in defense facilities, disqualification for a passport, the risk of internment, the risk of loss of employment"] are forfeitures within the meaning of our cases and as much protected by the Fifth Amendment as criminal prosecution itself."

The severe effects of disbarment which have been recognized in the opinions of this Court and its members for more than a century justify a determination that it is punishment to which the privilege against self-incrimination of the Fifth Amendment is applicable.

The privilege has been construed to permit incriminating testimony to be compelled by the removal of the possibility of incrimination through a grant of immunity. *Brown* v. *Walker,* 161 U.S. 591; *Ullmann* v. *United States,* 350 U.S. 422. The immunity granted, however, must be co-extensive with the scope of the privilege and testimony may be refused where it is not. *Counselman* v. *Hitchcock,* 142 U.S. 547. A witness has "a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him." *Stevens* v. *Marks,* 383 U.S. 234, 246. Thus, a State by granting immunity cannot compel a witness to give testimony which would incriminate him under Federal law. *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 54.

When petitioner invoked his privilege, immunity was granted to compel his testimony. The grant of immunity obviously carried the implied threat that any further refusal to testify would subject him to punishment for contempt. To justify this compulsion, however, it was necessary for the immunity to encompass all areas of incrimination including disbarment. If the immunity did not extend to disbarment because of limitations in statutory authority or for other reasons, the matters disclosed were improperly compelled and unavailable to the State for any incriminating purpose. For the privilege not only protects the refusal to give self-incriminating testimony but also forbids the use of such testimony improperly obtained by any form of compulsion. *Boyd* v. *United States,* 116 U.S. 616; *Bram* v. *United States,* 168 U.S. 532; *Wan* v. *United States,* 266 U.S. 1, 14-15; *Adams* v. *Maryland,* 347 U.S. 179; *In re*

Groban, 352 U.S. 330, 334; *Haynes* v. *Washington*, 373 U.S. 503; *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 57; *Schmerber* v. *California*, 384 U.S. 757; *Miranda* v. *Arizona*, 384 U.S. 436; *United States* v. *Blue*, 384 U.S. 251, 255. Disciplinary charges based on the subject matter of petitioner's testimony, therefore, violated the privilege against self-incrimination.[15]

2. PROCEDURAL DUE PROCESS WAS VIOLATED BY UPHOLDING AS BASIS OF DISBARMENT (A) CRIMINAL CONTEMPT CONVICTION WITHOUT APPROPRIATE HEARING, (B) CRIMINAL CHARGE OF AIDING AND ABETTING VIOLATION OF CITY CHARTER WITHOUT SAFEGUARDS OF CRIMINAL TRIAL, AND (C) FINDING OF OBSTRUCTION OF JUSTICE WITHOUT PROPER NOTICE OF CHARGE.

A. Criminal Contempt Conviction.

Petitioner's conviction of criminal contempt, for the reasons previously stated, must be considered here as a necessary basis for the disbarment order. Since this charge was considered "established as a matter of law" without further hearing in the disciplinary proceeding and thus automatically provided grounds for disbarment, the hearing on the criminal contempt conviction must satisfy due process standards for the severe punishment of disbarment. It is clear, however, that this hearing violated due

[15] A related question is raised by the finding of obstruction of justice based on petitioner's denial to Assistant District Attorney Scotti that he had made payments for Jack. The theory of the charge and the finding was that petitioner's misstatement impeded a grand jury investigation. On this theory, Scotti questioned petitioner, who was present pursuant to an informal request, when he was investigating the possibility of petitioner's participation in a crime but did not advise him of this fact and, consequently, did not alert him to his constitutional right to remain silent. The Fifth Amendment privilege would seem to require law enforcement officers to give this advice or be precluded from using any statements made as the basis of a charge or as evidence in any proceeding directed toward a punitive sanction. *Miranda* v. *State of Arizona*, 384 U.S. 436; cf. *Gouled* v. *United States*, 255 U.S. 298 (private papers obtained by stealth).

process requirements for proceedings resulting in serious punishments.

The Court has noted that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser* v. *Randall*, 357 U.S. 513, 520-521. It has held that the nature of punishment has an important bearing on procedural rights so that imprisonment for more than six months cannot be imposed without a jury trial. *Cheff* v. *Schnackenberg*, 384 U.S. 373; see *United States* v. *Barnett*, 376 U.S. 681. Accordingly, due process for the severe sanction of disbarment imposes more stringent standards than for the petty offense of contempt. For this reason, this Court's decision with respect to due process in *Ungar* v. *Sarafite*, 376 U.S. 575, for a minor penalty for contempt is not deemed controlling here with respect to the major punishment of disbarment.[16] Although lesser safeguards may be adequate for a relatively minor contempt punishment, due process with respect to the penalty of disbarment requires that before a criminal contempt conviction can be used as a basis for disbarment, the contempt proceeding must have provided at least a hearing before an impartial tribunal, the right of cross-examination, and the right to counsel. None of these procedural safeguards was accorded petitioner in the contempt hearing. *Cf. Isserman* v. *Ethics Committee*, 345 U.S. 927 (opinion of Mr. Justice Black).

The criminal contempt case was tried by the judge who preferred the charges, presented the evidence, and then

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[16] Petitioner's contempt punishment was characterized as "trivial" by Mr. Justice Goldberg in *United States* v. *Barnett*, *supra*, at 754. The sentence imposed was a fine of $250 and imprisonment for ten days which had already been served. Obviously, only a petty offense was involved. When this Court held, therefore, that the proceedings did not violate due process, it did so in the context of a petty offense and not the severe penalty of disbarment.

found petitioner guilty on the basis of his own charges and his own evidence. In addition, after being called upon to respond to lengthy charges on less than five days' notice, petitioner was required to go forward without counsel when the attorney with whom he appeared was granted permission to withdraw because an adjournment was denied. *Cf. Harris* v. *United States*, 382 U.S. 162.

(1) Impartial Tribunal.

Because fairness requires an absence not only of bias but even of the probability of unfairness, due process precludes a judge from trying a case in which he has an interest in the outcome and he will be deemed to have such an interest where he has preferred charges which are being tried. *Tumey* v. *Ohio*, 273 U.S. 510; *Offutt* v. *United States*, 348 U.S. 11; *In re Oliver*, 333 U.S. 257; *Cooke* v. *United States*, 267 U.S. 517; *Brown* v. *United States*, 359 U.S. 41. "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *In re Murchison*, 349 U.S. 133, 137. Accordingly, for disbarment purposes, the trial judge's interest in conviction is established by the fact that he filed the contempt charges even if we assume, as the Court did in *Ungar* v. *Sarafite, supra*, that petitioner's statement that "the Court is suppressing the evidence" did not render the contempt personal to the judge.[17] Lack of impartiality is also evidenced by the fact that the judge asserted with respect to the statement that was the basis for the contempt conviction that petitioner was "not only contemptuous but disorderly and insolent". Moreover, the judge assumed the role of prosecutor, as well as judge, by presenting all the evidence introduced to prove petitioner's

[17] One can only speculate as to the trial judge's reason for denying petitioner any stay whatever for an application to the Appellate Division and directing the sheriff forthwith to imprison an attorney of 25 years' standing at the Bar.

guilt. Sitting in judgment on his own evidence, he found petitioner guilty.[18]

The importance of an impartial tribunal is emphasized by the subsequent events which demonstrated the very substantial basis for petitioner's charge that evidence was being suppressed. In the disciplinary proceeding, charges III and IV mirrored the three counts on which Jack was convicted, namely two counts of conflict of interest under Section 886 and one count of conspiracy to obstruct justice. The Referee's findings made clear, however, that two of the counts of which Jack had been convicted had not been sustained in the disciplinary proceeding. The Referee found that there had been no violation of Section 886 with respect to the 299 Broadway lease because it had been approved and executed before petitioner "even discussed with Jack the matter of financing the improvements in Jack's apartment". The Referee in effect found that the conspiracy charge similarly had not been proved by his finding that the agreement to conceal petitioner's payments, an essential ingredient of the proof of conspiracy, had been made for the single purpose of avoiding unfavorable publicity and that no thought had been given to any criminal investigation. The charge was sustained as to petitioner not on the basis of any conspiracy but on the ground that petitioner's misstatement in an informal interview in Scotti's office constituted an obstruction of justice.

The single count of which Jack was convicted which the Referee sustained as to petitioner was that the Riverside-Amsterdam project was a matter of business pending before the City in which petitioner was interested at the time of the advances for Jack. The extremely tenuous nature of this so-called "interest" is evidenced by the fact

[18] In *Nilva* v. *United States*, 352 U.S. 385, 402, four members of the present Court concurred in the dissenting view that it was wrong for the same judge "who preferred the charges of contempt on his own initiative and based on his own knowledge to sit in judgment on the accused."

that it was in a state of complete dormancy for approximately one year surrounding the time advances were made while a policy question involving the entire Title I program was being resolved by the Federal Administrator. During this period, nothing was pending before Jack or the Board of Estimate of which he was a member. It is difficult to believe that a jury in full possession of all the facts would have returned a verdict of guilty.

(2) Right of Cross-Examination.

The contempt hearing also deprived petitioner of the important right of cross-examination. In *Willner* v. *Committee on Character*, 373 U.S. 96, 102, 103, this Court stated, with respect to the denial of admission to the Bar, "the requirements of procedural due process must be met before a State can exclude a person from practicing law" and that "procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood". A crucial factor in the contempt determination was whether petitioner had been emotionally overwrought and under the influence of medication. The judge who tried the contempt conviction not only prejudged this issue by characterizing petitioner as a malingerer in the course of the Jack proceedings, but undoubtedly relied upon his own observation of petitioner in the Jack trial in adjudging petitioner guilty in the contempt trial. Presumably, he concluded from his personal observations that petitioner's distraught emotional appearance was feigned and that the medication of which the court had been informed did not contribute to his condition. But the judge's personal knowledge was not in evidence in the contempt trial and thus could not be the subject of cross-examination or rebuttal.[19] *Cf. Panico* v. *United States*, 375

[19] If the judge did testify, he would be in the position of evaluating as a judge the testimony he had given as a witness thus depriving the accused of the right to an impartial tribunal. *In re Murchison*, 349 U.S. at 138.

U.S. 1. "The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such a way". *In re Murchison,* 349 U.S. at 139.

(3) Right to Counsel.

Petitioner was effectively denied the right to counsel when he was required to proceed forthwith after his attorney withdrew upon being refused an adjournment. In *Chandler* v. *Fretag,* 348 U.S. 3, 10, the court pointed out "A necessary corollary [to the right to counsel] is that a defendant must be given a reasonable opportunity to employ and consult with counsel". In view of the short period in which the contempt charges served upon petitioner were made returnable, it was not unreasonable to anticipate that an adjournment would be granted because of counsel's need to prepare his defense and his engagement in the trial of another case. Although it is unusual to refuse an adjournment in these circumstances and apparently contrary to the rules of the court, it is not contended here that this refusal was an abuse of discretion. But the refusal to grant petitioner any time at all to engage other counsel amounted to a denial of the right to counsel. "By denying petitioner any opportunity whatever to obtain counsel • • • the trial court deprived him of due process of law as guaranteed by the Fourteenth Amendment." *Chandler* v. *Fretag,* 348 U.S. 3, 10. See *Holt* v. *Virginia,* 381 U.S. 131, 136.

B. Aiding and Abetting Violation of City Charter.

The charge of aiding and abetting the violation of Sections 886 and 901 of the New York City Charter, which petitioner denied, is an indictable criminal offense[20] which does not involve professional misconduct or conduct related to the practice of law. Disbarment for this reason, therefore, is merely "the means of inflicting punishment

[20] See Penal Law, Secs. 2, 27 and 1936.

for a criminal offense in no way connected with the party's professional conduct" (Mr. Justice Field dissenting in *Ex Parte Wall*, 107 U.S. 265, 306). Thus, the punishment of disbarment which is more drastic than the statutory penalty,[21] is imposed upon petitioner upon a charge of criminal conduct unrelated to practice as a lawyer without the procedural safeguards of a criminal trial, and without the benefit of a jury to determine his guilt or innocence.[22] Where the only object is punishment, and where conduct related to the practice of law is not involved, it is submitted that it is a violation of due process to make a criminal charge the basis for disbarment without the procedural safeguards of a criminal trial, including the presumption of innocence and the required degree of proof.

The imposition of punishment "without a prior criminal trial and all its incidents" was held invalid in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 167, when the Court construed the deprivation of nationality as a punishment, stating, "If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further."

C. Conspiracy to Obstruct Justice.

Procedural due process was also violated by failure to give proper notice when the Referee found that the charge of conspiracy to obstruct justice was sustained, although he made no finding of any conspiracy, on the ground that petitioner for the purpose of obstructing the administra-

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[21] Violation of the Charter provisions involves punishment for a misdemeanor and loss of the office held.

[22] Petitioner's request for a jury in the disbarment proceeding, as well as for a transfer of the proceeding to another department of the Appellate Division which had no previous contacts with the matters involved (e.g., appeals from the contempt conviction and the Jack appeals), was denied by the Appellate Division.

tion of justice gave false information to Assistant District Attorney Scotti. The Referee in effect formulated a new charge—intention to obstruct justice—at the conclusion of the hearing and found petitioner guilty of this charge without prior notice.[23]

It is clearly a denial of due process to predicate disbarment on a charge of which petitioner had no notice. Defending against the charge of intending to obstruct justice, essentially a mental state, is clearly different from defending against a charge of conspiracy to obstruct justice which requires overt acts. This is particularly true in the circumstances of the present case where a charge of intention to obstruct justice would be met by focusing on the fact that the misstatement was corrected on the first business day after it was made, that petitioner testified at length thereafter before the Grand Jury, and that Jack was convicted in a trial in which petitioner testified. Because of the charge of conspiracy, however, a focal point of the evidence was on the various meetings and conversations which preceded petitioner's misstatement which the Referee found were only directed toward avoiding adverse publicity for Jack and not to any criminal violations. *Cf. Morgan* v. *United States,* 304 U.S. 1, 18.

3. THE SEVERE PUNISHMENT OF DISBARMENT FOR THE CONDUCT CHARGED IS SO UNRELATED TO THE LEGITIMATE INTEREST OF THE STATE IN REGULATING THE PRACTICE OF LAW AS TO CONSTITUTE A DEPRIVATION OF DUE PROCESS.

The extreme penalty of disbarment imposed upon petitioner on the basis of conduct unrelated to the practice of law violates substantive due process because its severely punitive character is not reasonably related to the State's proper interest in regulating membership in the Bar. The punitive purpose of the disbarment order is highlighted by

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[23] Since the charge was specifically based on "Penal Law, Section 580" which requires a consipracy, the Referee's finding also has *ex post facto* implications.

the Referee's finding that petitioner has not been actively engaged in the practice of law since approximately 1958. But even if petitioner were an extremely active practitioner, it would be difficult to justify petitioner's disbarment on the basis of any legitimate regulatory interest.

Petitioner's professional conduct in the active practice of law for over 20 years was without blemish. The grounds for disbarment arise out of a single episode unrelated to professional conduct or to the practice of law not involving moral turpitude. The State cannot deny a person of membership in the Bar for reasons that do not have a rational connection to their fitness or capacity as practitioners. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232. "There is no showing of 'overriding and compelling state interest' (*Gibson* v. *Florida State Legislative Comm.,* 372 U.S. 539, 546) that would warrant intrusion" (*DeGregory* v. *New Hampshire Atty. Gen.,* 383 U.S. 825, 829) into petitioner's constitutionally protected right to remain a member of the bar. *Cf. Schware* v. *Board of Bar Examiners, supra; Willner* v. *Committee on Character,* 373 U.S. 96. The "requisite rational relation" between the severe punishment of disbarment and the proper objects of regulation of the practice of law is entirely absent. Cf. concurring opinion in *Trop* v. *Dulles,* 356 U.S. 86, 114.

Petitioner's conviction of contempt does not provide an adequate basis for disbarment. In *In re Isserman,* 345 U.S. 286, in which an attorney was disbarred as a result of a contempt conviction, Mr. Justice Jackson, in a strong dissent, stated (p. 292) that "We do not recall any previous instance * * * where a lawyer has been disbarred by any court of the United States or of a state merely because he had been convicted of a contempt." In the next term of court, upon petition for rehearing, the order of disbarment was set aside. *In re Disbarment of Isserman,* 348 U.S. 1. In *Sacher* v. *Association of the Bar,* 347 U.S. 388, a judgment of disbarment by a federal district court based upon a contempt conviction was reversed by this Court as

"unnecssarily severe" and remanded for further consideration. See also *Ex Parte Tillinghast,* 4 Pet. 108. In *Ex Parte Robinson,* 19 Wall. 505, an order disbarring an attorney for contempt was vacated on the ground that the statutory penalties provided for contempt negated all other types of punishment including disbarment. It is indeed shocking to the ordinary sense of justice and fair play to permit the drastic sanction of disbarment to be imposed as additional punishment in this case where the maximum statutory penalty permitted was a fine of $250 and imprisonment for thirty days. The separate charge that petitioner uttered the outburst that resulted in the conviction for criminal contempt provides no better basis for disbarment than the conviction itself.

The charge of aiding and abetting the violation of Sections 886 and 901 [24] of the City Charter is based on statutory prohibitions involving no moral turpitude. Neither an intent to influence nor influence in fact was an element of the statutory violation. Thus, it was possible to find that a loan made to a close friend of more than twenty years wholly unrelated to any official conduct was prohibited by the City Charter. The "interest" in a matter pending before the city was found in the Riverside-Amsterdam project which was dormant at the time awaiting resolution of general policy considerations by the Federal Government and which was under the principal jurisdiction of the Slum Clearance Committee. A statutory violation so tenuously and technically grounded hardly supplies a rational basis for disbarment. *Cf. Schware* v. *United States, supra,* at 242.

The charge of conspiracy to obstruct justice and administration of the City Charter was sustained although no conspiracy was found. The Referee found affirmatively that the only concerted action related to newspaper pub-

[24] Jack was acquitted of the violation of Section 901. Its inclusion in the charges against petitioner remains unexplained.

licity. Certainly, petitioner's isolated misstatement to an assistant district attorney, which was corrected almost immediately and prior to the convening of the Grand Jury, does not provide a reasoned basis for disbarment. *Cf. Schware* v. *United States, supra,* at 241.

This Court has taken notice on numerous occasions of the extreme severity of the punishment of disbarment and of the humiliation and disgrace which accompany it. "A removal from the Bar should, therefore never be decreed where any punishment less severe * * * would accomplish the end desired." *Bradley* v. *Fisher,* 13 Wall. at 355. This harsh sanction weighs so disproportionately against the charges sustained as to constitute a violation of substantive due process.[25]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON LIFTIN
818 Eighteenth Street, N. W.
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Attorney for Petitioners

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[25] If the statutes relied upon are construed to permit this result (Judiciary Law, Sections 750 and 751; Penal Law, Section 580; New York City Charter, Sections 886 and 901), they are unconstitutionally vague in violation of due process. *Winters* v. *New York,* 333 U.S. 507; *Thompson* v. *Louisville,* 362 U.S. 199; *Musser* v. *Utah,* 333 U.S. 95.

APPENDIX

APPENDIX

Opinion of the Appellate Division, January 18, 1966

In re Ungar

PER CURIAM

This is a disciplinary proceeding brought by The Association of the Bar of the City of New York. Respondent was admitted to the Bar on November 4, 1935 in the Appellate Division, First Department. The charges are as follows:

"1. Respondent, on or about November 25, 1960, engaged in conduct, during the course of the trial of Hulan Jack, which resulted in his being found guilty of criminal contempt of court on or about December 13, 1960.

"2. During the course of the trial of *People* v. *Hulan E. Jack*, on or about November 25, 1960, respondent shouted at the court, while the court was in session and in the immediate hearing and presence of the jury, 'I am being coerced and intimidated, the court is suppressing the evidence.'

"3. Respondent, as a person doing business with the City of New York or interested in City contracts, aided and abetted Hulan E. Jack in violating Sections 886 and 901 of the New York City Charter, and other provisions of law, by making gifts, loans or gratuities, or giving other things of value, to Hulan E. Jack, an official of the City of New York.

"4. Respondent conspired with Hulan E. Jack to obstruct justice and the administration of the New York City Charter, Sections 886 and 901, in violation of Penal Law, Section 580, and other provisions of law, by concealing certain payments to Fred Bechtel, or others, for work done on Jack's behalf in or about 1958, or for the benefit of Jack."

The findings of the Referee, George Trosk, Esq., sustaining the charges are amply supported by the record and his excellent and comprehensive report is confirmed.

The record shows the following facts to have been established. During February, March and April, 1958, Hulan E. Jack's apartment at 45 West 110th Street, County of New York, was renovated and redecorated. Jack was President of the Borough of Manhattan and a member of the Board of Estimate of the City of New York. Respondent supplied and paid the contractor, one Bechtel, for the work on Jack's apartment. During this period there was pending before the Board of Estimate the Riverside-Amsterdam project affecting the area in the Borough of Manhattan bounded by West 83rd and West 86th Streets, Amsterdam Avenue and the Hudson River. Respondent and his corporation sponsored the project. Jack has been found guilty of conspiring with the respondent to obstruct justice and the substantive crimes of accepting illegal gratuities by a public official in violation of section 886 of the New York City Charter. (*People* v. *Jack*, 12 N Y 2d 721.)

The arrangments for the work to be done by Bechtel were devious in that the estimate furnished to the respondent, a written direction for extra work authorized by respondent and a purported contract for the work falsely misdescribed the location of the work. The estimate referred to "55 East 110th Street"; the direction for extras and the contract specified "158 East 119th Street". The amount expended for the renovation and decoration of the Jack apartment was for the year 1958, treated by respondent's corporation as an expense in its income tax return. An amended tax return prepared in February, 1960 eliminated said item as an expense. At this time, however, respondent was aware of the Grand Jury investigation later resulting in the indictment of Jack.

Respondent in December, 1959 attended the office of the District Attorney of New York County. He initially

denied making payments for the work done at the Jack apartment and later recanted.

Between December 7 and 11, 1959 the date of respondent's initial appearance at the office of the District Attorney, the respondent, Jack, Bechtel and others formulated the plan to assert that payment for said work had been made by Jack or his wife. This plan followed an investigation commenced by a newspaper reporter; its avowed purpose was to avoid publicity unfavorable to Jack. The plan was in operation when Bechtel was served with a subpoena of the District Attorney and at the time respondent attended the office of the District Attorney.

Prior to December 11, 1959 respondent arranged for meetings with Bechtel, paid him the sum of $200 on account of the balance claimed by him for the work in the Jack apartment and persuaded Bechtel to agree to state that he was paid by Jack and not by respondent and to substantiate it by issuing receipts falsely acknowledging payments from Jack. The scheme aborted when Bechtel under subpoena attended before the District Attorney and informed him he had been paid by the respondent. Respondent was confronted by the District Attorney with the contractor's claim and recanted his prior denial of such payments.

The contempt underlying the second charge against the respondent occurred during the interrogation of the respondent during the second trial of Jack. Respondent was asked: "Q. When you told Mr. Jack that there was now a full scale investigation before the grand jury, what did Mr. Jack tell you?" Respondent first demurred to the question: "Well, that's only a small part of what I told him." Then respondent argued he was unable to state Jack's response because it was part of a half-hour conversation. Respondent asserted he was too upset and nervous and: "I am not being a voluntary witness. I am being pressured and coerced and intimidated into testifying, and

I can't testify under these circumstances." Respondent finally said: "I am not going to answer questions, your Honor. I am not going to testify in this confusion, and the Court nor anyone else will make me testify in this emotional state. I am absolutely unfit to testify because of your Honor's attitude and conduct towards me. I am being coerced and intimidated and badgered. The Court is suppressing the evidence."

The questions addressed to respondent were clearly proper. Defendant Jack did not urge the objections raised by the respondent. He assumed the role of both defendant and attorney.

The record, apart from respondent's declaration, is singularly devoid of evidence of a distraught, disoriented or irrational witness incapable of responsive answers; it establishes a deliberate course of conduct on the part of the respondent obstructive of the orderly and expeditious trial of the indictment against Jack. Respondent's contention that the contemptuous conduct was induced by medication intended to tranquilize but which, in fact, was an anti-depressant tending to exite and induce tremors is without substance. This ground was first advanced by respondent four years after the event.

Respondent called as his witness one of the assistant district attorneys present during the two Jack trials and the proceedings culminating in the conduct on which the contempt charge is based. He testified concerning respondent's conduct: "I observed you [respondent], and I believe from my observation it was deliberate."

Following the aforesaid testimony, respondent stated: "As a result * * * of [said] testimony * * * I will not call any of the witnesses that I have mentioned, or any of the other public officials whom I have subpoenaed, including the Mayor and Comptroller * * * and so forth."

The learned trial court found, and the record establishes, that the respondent's conduct was an extension of his con-

duct during the first trial of the Jack indictment during which he persistently ignored rulings, shouted, gesticulated and provoked incidents despite being admonished and cautioned on numerous occasions. Respondent was found guilty of contempt of court by the judge who presided at the trial. The contempt followed the criminal trial. (see *Ungar* v. *Sarafite*, 376 U.S. 575.)

A careful examination of the extensive record, exhibits and briefs fails to reveal extenuating circumstances. Respondent's conduct, activities and methods were clearly in violation of the ethical standards required of members of the Bar. (*Matter of Dougherty*, 7 A D 2d 163; *Matter of Lange*, 283 App. Div. 223.) Moreover, there is no indication of remorse of conscience or contrition.

Respondent's informal applications to reopen the proceedings to further examine Mrs. Safrin, a witness, and to adduce additional evidence and to reconsider our prior denials of similar relief are denied. Our examination of the record satisfies us that respondent has been afforded and availed himself of ample opportunity to address himself to and meet the relevant issues.

Respondent should be disbarred.

ALL CONCUR

Order of Appellate Division, April 21, 1966

The Association of the Bar of the City of New York, by Eric Nightingale, Esq., its attorney, having presented to this Court on the 25th day of September, 1962, a petition containing charges of professional misconduct against the above-named respondent, Sidney J. Ungar, who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 4th day of November, 1935, at a term of the Appellate Division of the Supreme Court, First Judicial Department, and having petitioned the Court

to take such action upon such charges as in the judgment of said Court justice may require; and the respondent having appeared herein by his attorneys, Messrs. Rabinowitz & Boudin, and having interposed an answer to said petition, duly verified the 29th day of November, 1962, and the Court having duly made and entered an order on the 18th day of December, 1962, appointing George Trosk, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and a hearing, pursuant to said order of reference having been duly held before the said Referee and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated the 22nd day of March, 1965, and was filed in the office of the Clerk of this Court on the 1st day of April, 1965;

And the petitioner thereafter and on the 18th day of January, 1966, having moved for an order confirming the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper; and the respondent having cross-moved for an order disaffirming the Referee's report and dismissing the petition, and thereafter the respondent by letters dated February 11 and 17, 1966, with exhibits annexed thereto having renewed his application for leave to reopen the hearing before the Referee and the Petitioner having opposed same by letter dated February 15, 1966;

Now, upon reading the petition of The Association of the Bar of the City of New York, verified the 2nd day of August, 1962, the affidavit of Eric Nightingale, Esq., annexed thereto, sworn to the 2nd day of August, 1962, the notice of presentation of said petition, dated the 22nd day of August, 1962, with proof of due service thereof upon the respondent, the answer of the respondent to said petition, verified the 29th day of November, 1962, the order of this

Court, dated the 18th day of December, 1962, appointing George Trosk, Esq., as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 18th day of December, 1962, the report of George Trosk, Esq., the Referee herein, dated the 22nd day of March, 1965, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on the 1st day of April, 1965, and upon reading and filing the undated notice of motion for an order confirming the report of the Referee and adjudging the respondent guilty of professional misconduct, with proof of due service thereof, and the undated notice of cross-motion for an order disaffirming the report of the Referee and dismissing the petition, with proof of due service thereof; the letters of respondent dated February 11 and 17, 1966, with exhibits annexed thereto and the letter of the petitioner dated February 15, 1966, and after hearing Mr. John G. Bonomi for the motion to confirm the report of the Referee and Mr. Emanuel Redfield, and the respondent pro se, in opposition thereto and in support of the cross-motion to disaffirm the report of the Referee and to dismiss the petition; and due deliberation having been had thereon and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counselor-at-law, it is hereby unanimously

Ordered that the application by respondent to reopen the hearings before the Referee is denied; and it is further unanimously

Ordered that the report of George Trosk, Esq., the Referee herein, filed in the office of the Clerk of this Court on the 1st day of April, 1965, be, and the same hereby is, confirmed; and it is further unanimously

Ordered that the said Sidney J. Ungar be and he hereby is disbarred from practice as an attorney and counselor-

at-law in the State of New York, effective May 23, 1966; and it is further unanimously

Ordered that the name of said Sidney J. Ungar be struck from the roll of attorneys and counselors-at-law in the State of New York, effective May 23, 1966; and it is further unanimously

Ordered that the said Sidney J. Ungar be and he hereby is commanded to desist and refrain from the practice of law in any form, either as principal or agent, clerk or employee of another, effective May 23, 1966; and it is further unanimously

Ordered that the said Sidney J. Ungar be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective may 23, 1966; and it is further unanimously

Ordered that the said Sidney J. Ungar be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, effective May 23, 1966.

Order of Court of Appeals, July 7, 1966

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken as of right by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that there are no substantial constitutional questions directly involved.

Order of Court of Appeals, July 7, 1966

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.